

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11585

PRINCE ALBERT SHANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

830

**APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

(In Forma Pauperis)

CHARLES M. IRELAN,
United States Attorney.

WARREN E. BURGER,
Assistant Attorney General.

D. VANCE SWANN, Attorney,
Department of Justice.

PETER C. CHARUHAS, Attorney,
Department of Justice.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 16 1953

Joseph W. Stewart

CLERK

APPELLEE'S STATEMENT OF QUESTIONS PRESENTED

1. Whether this appeal should be dismissed for failure to docket the record on time in accordance with Rule 9 of this court.

2. Whether the Government properly terminated the insured's allotment for payment of premiums on his National Life Insurance policy, because he was "AWOL" from his assigned duty station.

3. Whether the policy of insurance was in force at the time of the insured's death on January 3, 1946.

(I)

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COUNTERSTATEMENT OF THE CASE

This action was instituted by the Appellant under Section 617, National Service Life Insurance Act of 1940, as amended, and Section 19 of the War Risk Insurance Act of 1924, as amended (Title 38, U. S. C. A., Section 445, 817.)

The undisputed facts agreed to below show that a \$10,000 National Service Life Insurance policy was issued to James O. Watkins during military service effective February 1, 1943, and was continued in force by the payment of premiums thereafter by allotment of his service pay. The appellant, who was named as contingent beneficiary in the policy, succeeded the primary beneficiary, Mary Watkins (mother of the insured), following her death on June 23, 1946, and presented a claim for insurance to the Veterans Administration which was denied upon the ground that the policy had lapsed for non-payment of the premium due December 1, 1945, and, therefore, was not in force on the date of the insured's death.

While on duty with the 718th Sanitary Company, Medical on the Island of Luzon, Philippine Islands, the insured absented himself on September 23, 1945, from his organization. He was entered on the records as being "AWOL" (absent without leave) from September 23, 1945, and carried on the rolls in such status thereafter (R. 42, 49, 92, 94). He was never returned alive to Army control and was murdered, by a person or persons unknown, on January 3, 1946 (R. 83).

As a result of being "AWOL" and in accordance with Army regulations (A. R. 35-1420) and normal administrative practice his organization stopped his pay and terminated his allotment for National Service Life Insurance (R. 6, 7, 84). Premiums on the policy were paid through November 1945 and lapsed for nonpayment of the premium due December 1, 1945 (R. 6). Under the provisions of the policy the thirty-one day grace period expired at midnight, January 1, 1946.

The defendant-appellee defended upon the ground that the policy lapsed at midnight January 1, 1946, for nonpayment of premiums and was therefore not in force on January 3, 1946, the date of the insured's death. District Judge Keech entered findings of fact, conclusions of law and judgment in favor of the Government, holding that protection under the policy terminated on January 1, 1946, by reason of the discontinuance of the allotment based on the insured's "AWOL" status, and the policy, therefore, was not in force under premium-paying conditions on January 3, 1946, the date of the insured's death (R. 6, 7, 83, 88, 92, 94).

Following the entry of the judgment on December 28, 1951, the plaintiff-appellant, on January 26, 1952, moved in the court below to appeal in forma pauperis. District Judge Keech denied the motion on February 1, 1952, noting that there was no substantial question involved (R. 99). No further action was taken in the matter until April 23, 1952, when the plaintiff-appellant filed in this court a similar motion for leave to appeal in forma pauperis. This court on order entered September 19, 1952, granted the petitioner's motion for leave to appeal in forma pauperis from the judgment of the District Court.

PERTINENT STATUTES

Section 73 (g) of the Federal Rules of Civil Procedure (28 U. S. C. A. 228) reads as follows:

(g) *Docketing and Record on Appeal*.—The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

SUMMARY OF ARGUMENT

I

Upon filing the motion for leave to appeal in forma pauperis, the appellant had forty days within which to docket the record or secure an extension of time. The appellant failed to take any action until eighty-seven days later on April 23, 1952, when he filed in this court a new motion for leave to appeal. The appeal should, therefore, be dismissed.

II

"AWOL" (absent without leave) aside from being a military offense punishable by Court Martial under Article 61 of the Articles of War is also a term descriptive of the status of a member of the Army, indicating that he is not present at his proper place of duty and has not been given authority or permission to be at any other place. Such status is easily

determined by roll call and where the regulations provide for termination of pay and allotments for absences over fifteen days, the normal administrative practice of his organization would stop his pay and terminate his allotments without regard to whether he was at fault.

III

The thirty-one day grace period expired on January 1, 1946, which is a legal holiday and, hence, under Veterans Administration Regulation 3415, the insured had until midnight of the next business day to pay the premium.

The evidence showed that the insured died in the Philippine Islands on January 3, 1946, and that the policy was in force through midnight January 2, 1946, Eastern Standard Time. There being a thirteen hour difference in time between Washington, D. C., and the Philippine Islands, twelve midnight, January 2, Eastern Standard Time, corresponds to 1:00 p. m., January 3, Philippine Islands Time. Having failed to establish that the insured died before 1:00 p. m., Philippine Islands Time, the appellant has not sustained the burden of proving that the insured died while the policy was in force.

ARGUMENT

I. Appellant having failed to docket the record or otherwise perfect the appeal within the time required under the rules of this court, his appeal should be dismissed

Under Rule 73 (a) of the Federal Rules of Civil Procedure a notice of appeal is required to be filed in the District Court within the time allowed¹ and the filing of such notice is mandatory and jurisdictional. *Bradley v. Pace*, 87 App. D. C. 11, 183 F. 2d 806. However, it has been held that the filing of an application for leave to proceed upon appeal in forma pauperis satisfies the provision of Rule 73 (a) that a party may appeal by filing with the District Court a "notice of appeal." *Boykin v. Huff*, 73 App. D. C. 378, 121 F. 2d 865 (1941); and *Tesciona*

¹ Within sixty days of the entry of the judgment when the Government is a party.

v. *United States*, 141 F. 2d 811 (C. C. A. 9). Therefore, the filing in the court below on January 26, 1952, of appellant's motion to appeal in forma pauperis, met the requirement of notice. This motion to proceed in forma pauperis was denied on February 1, 1952, by District Judge Keech, who indicated that there was no substantial question involved (R. 99).

The appellant took no further action in the court below and on April 23, 1952, eighty-seven days after January 26, 1952, he filed in this court a motion for leave to appeal in forma pauperis, which this court granted on September 19, 1952.

Under Rule 73 (g) of the Federal Rules of Civil Procedure, an appellant must docket the record within forty days after filing the notice of appeal and having failed to comply therewith his appeal should be dismissed. While the rule permits the District Court to extend to ninety days the time for docketing the record, it has been held that the extension must be granted by the District Court before the primary forty-day period has expired. *Marrow, et al. v. Wood, et al.*, 126 F. 2d 1021. If this rule were not adhered to the denial of a motion to appeal in forma pauperis would permit the appellant an indefinite time within which to perfect his appeal.

In the case of *Gammill v. Federal Land Bank of St. Louis, et al.*, 129 F. 2d 501 (C. C. A. 7), the Circuit Court was requested to grant leave to docket the appeal although the time for such docketing had expired. The court stated:

* * * it is clear that the rules are expected to be followed, and that unless reasons satisfactory to the court are advanced as a basis for special relief from their provisions, it will take such action as it deems appropriate. In this case, such action would be denial of leave to docket the appeal, which leave is required by Rule 11 (2) of this court: "And in no case shall the appellant be entitled to docket the appeal after the time allowed under this rule, unless by special leave of this court." We do not find the reasons set forth by appellant sufficiently persuasive to justify relaxation of Rule 73 (g) or our rule 11 (2). Cf. *Burke v. Canfield*, 72 App. D. C. 127, 111 F. 2d 526; *United States v. Schlottfeldt*, 7 Cir., 123 F. 2d 109.

The appellant was represented by able counsel and no excuse was presented for his failure to comply with the rules. In *Maghan v. Young, et al.*, 80 App. D. C. 395, 154 F. 2d 13, where the appellant sought to justify his failure to docket the record in time by urging that he was professionally engaged in attending to other matters, the court said:

Shortly after the adoption of the new Rules we did grant relief in a somewhat similar case, on the ground that the Rules were new and that it was unlikely counsel had sufficiently acquainted themselves with their terms, but we were careful on that occasion to advise the Bar that we intended thereafter to exercise sparingly our discretion to save an appeal prosecuted in disregard of the Rules. In accordance with that ruling we have since, we think, invariably declined to extend relief, except for convincing reasons * * *.

The reasons advanced in the present case show neglect, but fail to show excusable neglect.

The fact that this court has granted the appellant's motion for leave to appeal in forma pauperis does not preclude this court from considering, at this time, the question of whether the record was docketed within the time allowed by the rules. Thus, in *Randolph v. Randolph*, — App. D. C. —, 198 F. 2d 956, Chief Judge Stephens, delivering the opinion of the court stated:

Therefore the full time for appeal commenced to run and is to be computed from May 31, the date of the entry of the order denying the motion of May 3. But neither the application for leave to appeal *in forma pauperis*, nor the notice of appeal, was filed in the District Court within 30 days of May 31; the former was filed on July 9 and the latter on August 15. Therefore the appeal was not taken within time and must be dismissed, notwithstanding the order of this court of August 13 granting the appellant's motion of July 20, filed in this court, for leave to proceed upon appeal *in forma pauperis*. That order was inadvertently entered and is without legal effect, because the time pro-

vision in Rule 73 (a) is jurisdictional, *Bradley v. Pace*, 87 U. S. App. D. C. 11, 183 F. 2d 806 (1950), and this court was therefore without power to enter it.²

Since the appellant failed to docket the record within the forty day period or obtain an extension, and showed no valid excuse for the delay, the appeal should be dismissed.

II. Upon the insured's having been listed as "AWOL," the Army properly terminated his pay and allotments in accordance with regulations

Army Regulation 35-1420, December 15, 1949, which was current at the time the insured absented himself, provided in pertinent part:

1. Determination of character of absence.—*a.* In case of absence from duty of any person in the military service, the question whether such absence is or is not authorized, and, if not, whether it is absence without leave or is desertion, is for administrative determination, and the general rules given in these regulations should serve as a guide in determining the pay and allowance rights and the forfeitures involved. [Emphasis supplied.]

b. In the absence of a court-martial finding thereon, it is sufficient to justify the withholding of pay and allowances that the fact of an unauthorized absence appears upon the morning report of the company. * * *

* * * * *

3. * * * *a.* Neither pay nor allowances accrue to any person in the military service during unauthorized absences in excess of 24 hours, unless excused as unavoidable. * * *

A distinction is made between absence without leave which is denounced in the Manual for Courts-Martial, and absence without leave determined administratively for purposes of pay. In the case of the military offense of absence without leave, Article 61, Manual of Courts-Martial 1928, provides:

² Cf. *Stumpf v. Matthews*, 89 App. D. C. 231, 195 F. 2d 25; and *Arline, et al. v. Brown*, 190 F. 2d 180 (C. C. A. 5).

Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station or camp without proper leave, shall be punished as a court martial may direct.

This is an offense defined by statute requiring proof of guilt before a court-martial. There are stated elements of the offense and the proof to establish the Government's case must be substantial and beyond a reasonable doubt.

Absence without leave, however, aside from being a military offense is a term descriptive of the status of a member of the Army, indicating that he is not present at his proper place of duty and has not been given authority or permission to be at any other place. Such a status is quickly determined as a fact at any time a scheduled roll call or muster reveals the individual's absence.

This distinction was made as early as 1875 by the Supreme Court of the United States in the case of *United States v. Landers*, 92 U. S. 77, 79, where the court stated:

Forfeiture of pay and allowances up to the time of desertion follows from the conditions of the contract of enlistment, which is for faithful service. The contract is an entirety; and, if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. *And, for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-martial; it is sufficient to justify a withholding of the moneys that the fact appears upon the muster rolls of his company.* If the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department. But forfeiture of pay and allowances for future services, as a condition of restoration to duty, can only be imposed by a court-martial. [Emphasis supplied.]

From the foregoing, it appears that the mere absence, as noted on the muster rolls of the company is sufficient to authorize a stoppage of pay, with recognition that in case an error or excuse was later presented, corrective action could be taken on proper application. This view has been repeated in numerous decisions by the Comptroller of the Treasury (see 12 Comp. Dec. 328; 25 Comp. Dec. 26; 27 Comp. Dec. 675). See also *Dodge v. United States*, 33 C. Cls. 28.

The Comptroller of the Treasurer, in 27 Comp. Dec. at page 678, stated:

I am of the opinion that in case of an enlisted man charged with desertion who is found by a court-martial not guilty, or whose finding of guilty has been disapproved by the reviewing authority, without, in either case, finding him, either specifically or by inference, guilty of the lesser offense of absence without leave, his civil or contractual obligation is still open to administrative determination, and if it be administratively determined that he was absent without leave he should lose pay for the period of his absence.

Also, in 25 Comp. Dec. at page 29, he stated:

No pay accrued during the 30 days, or 1 month, the soldier was absent without leave; therefore in that month he earned no money for the allotments of classes A and B, or from which to pay the insurance premium.

On August 13, 1946, the Army made an administrative determination that the insured "was not in duty or pay status at the time of death" (R. 84). Such a determination to the effect that the insured was "AWOL" and not entitled to pay or allotments is not subject to judicial review.³ *Reid v. United States*, 161 F. 469, 472.

Appellant makes much of the fact that the Government in the trial court failed to introduce into evidence WD AGO Form

³ In the recent case of *Sawyer v. United States*, 107 F. Supp. 160, Judge Davies said:

"(7) When a person is in a nonpay status for 15 days * * * The Army legally discontinued the insured's Class N allotment for payment of premiums on the said insurance contract * * *."

30 (Notification of Discontinuance of Allotment), and because of such failure there was no evidence that the allotment was terminated.

As to the foregoing, the Government introduced in evidence the insured's payroll and service records which established that the insured was "AWOL" and that he was not due any pay or allotment (R. 7). In this connection the appellant agreed with the court below as to the facts in the case and based his argument solely on the ground that there was no adjudication that the insured was "AWOL." The court stated as follows (R. 6 and 7):

The COURT. Follow me now. This is a claim by Prince A. Shannon, a half brother of the deceased, James O. Watkins, under a policy of government insurance No. N 8575456, in the amount of \$10,000, effective February 1, 1943. The allotment from the service pay of the decedent Watkins, paid through November 1945, the next premium being due December 1, 1945, with a grace period of 31 days which means that the policy was effective through midnight, January 1, 1946.

The Veteran decedent died January 23, 1946.⁴ The original beneficiary under the policy was the mother of the veteran decedent and the claimant, Prince A. Shannon; she died June 23, 1946.

It is agreed that the claimant Prince A. Shannon is the sole heir of the decedent veteran James O. Watkins.

Now at that point, everybody is in accord.

The Government contends that the deceased veteran was AWOL from January 23, 1945,⁵ and that under army regulations, there was a forfeiture of pay and allowance, hence the policy ceased to be in force and effect as of midnight January 1, 1946.

Plaintiff claims that there was no adjudication, that veteran decedent was AWOL on June 3,⁶ 1946, subsequent to his death.

⁴ Typographical error, correct date January 3, 1946.

⁵ Typographical error, correct date September 23, 1945.

⁶ Typographical error, correct date January 3.

There being no objection by counsel, the foregoing statement by the court constituted a stipulation of the facts.

Even apart from the stipulation of facts, it is sufficient for the Government to show from the payroll records which were introduced in evidence, that the insured was "AWOL" from September 23, 1945, and, therefore, was not entitled to pay and insurance allotments. A continuance of allotments under such circumstances would be unauthorized and would not have the effect of keeping the policy in force. See *United States v. Dora Ann Jones*, 101 F. Supp. 128.

III. Assuming that the policy was in force through midnight January 2, 1946, Washington time, the appellant failed to prove that the insured died while the policy was in force

The parties have stipulated that the insured died in the Philippine Islands on January 3, 1946. In the court below the question of a time differential between the Philippine Islands and Washington, D. C., where the insurance contract was executed, was not brought up by either party. The appellant now for the first time asks the court to take judicial notice of the fact that when it is January 3 in the Philippine Islands it is January 2 in Washington, and hence, that the insured died on January 2, while the policy still remained in force. However, if the court is to take judicial notice of the time difference between the Philippine Islands and Washington, it should take judicial notice that the actual time difference is 13 hours according to the Washington Naval Observatory. This means that when it was midnight, January 2, in Washington it was 1:00 p. m., January 3, in the Philippine Islands. Accordingly, if the insured died before 1:00 p. m., Philippine Islands time, his death occurred before midnight January 2, Washington time, and while the policy remained in force. However, if the insured died after 1:00 p. m., Philippine Islands time, his death occurred on January 3, Washington time, after protection had expired.

It is not disputed that under the law the appellant has the burden of proving that the insured died while the policy was still in force. *White v. Prudential Ins. Co. of America*, 235 Mo. App. 156, 127 S. W. 2d 98-102. The only evidence in the

record to fix the time of death is the ambiguous date of January 3, 1946; presumably this refers to Philippine Islands time. There is nothing in the record to indicate that the insured did not die after 1:00 p. m., Philippine Islands time. The appellant, therefore, has not sustained the burden of proof and it cannot be said that the finding of the court below, that the insured died after insurance protection had expired, is clearly erroneous and without evidence to support it.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below dismissing the complaint should be affirmed.

CHARLES M. IRELAN,
United States Attorney.

WARREN E. BURGER, *Assistant Attorney General.*
D. VANCE SWANN, *Attorney, Department of Justice.*
PETER C. CHARUHAS, *Attorney, Department of Justice.*

JOINT APPENDIX

(18)

18 In the United States District Court for the District of
Columbia

Civil Action No. 3481-50

PRINCE A. SHANNON, BOX 25, LORTON, VIRGINIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed June 12, 1951. Harry M. Hull, Clerk.

AMENDED COMPLAINT FOR MONEY JUDGMENT FOR PROCEEDS
OF LIFE INSURANCE POLICY

1. Jurisdiction is had by virtue of this being a suit for more than \$3,000.00, exclusive of interest and costs, Title 38, § 817 and § 445.

2. The Plaintiff brings this action in his own right as the surviving contingent beneficiary of a National Service Life Insurance Policy, Number N-8 575 456, insuring the life of Plaintiff's brother, James Odell Watkins, Deceased, and as the sole surviving heir and next of kin of Mary Watkins, Deceased, mother of Plaintiff and the said James Odell Watkins, Deceased, and who was the principal beneficiary of the said life insurance policy.

3. Defendant is sued in her own right as the Insurer in the said life insurance policy.

4. The said National Service Life Insurance Policy, Number N-8 575 456, was issued to the said James Odell Watkins, Deceased, Service Number 33 452 149, effective February 1, 1943, in the face amount of \$10,000.00, with Mary Watkins, Deceased, named as principal beneficiary and Plaintiff named as contingent beneficiary. The said Mary Watkins, Deceased, died June 23, 1946. The policy was issued by Defendant to the Insured, in consideration of monthly premium payments

of \$0.65 per month per thousand. This premium was paid by Defendant from an amount which was deducted and retained by Defendant from the Insured's pay in the form of an Allotment known as Class D or Class N Allotment. The application of the Insured was certified by F. W. Nollen, 2nd Lt., NMB, AUS, 1302 S. W., and bore the following inscription stamped on the duplicate.

To the Applicant:

This duplicate copy should be forwarded to your beneficiary or other close relative as evidence of your application for National Service Life Insurance. The original application was forwarded to the Veterans' Administration on the date of execution noted below. Required monthly premiums will be deducted from your pay.

5. From the time of the induction of the Insured into the Armed Forces on or about January 15, 1943, until the time of the death of the Insured, the premium payments were always paid in the manner aforesaid, there being no provisions for alternate methods of payment in the event that the Defendant should fail, refuse, or neglect to make the payments in accordance with the authorization of the Insured. Plaintiff avers that the said premiums were either made by Defendant to the date of the death of the Insured, or Defendant is estopped from denying that the said payments were made, or that if the premiums were not paid the Defendant wrongfully failed, refused, or neglected to pay the said premiums.

6. The Insured, James Odell Watkins, died on or about January 3, 1946, on Luzon Island, Philippine Islands, according to a communication received by Plaintiff which read as follows:

The records show that James O. Watkins, service number 33 452 149, died 3 January 1946, on Luzon Island, Philippine Islands.

Sincerely yours,

(s/d) JOHN J. DONOVAN,
Colonel, AGD c a c, Commanding.

20 Plaintiff received a further communication dated 12 July 1950 which read as follows:

Mr. PRINCE A. SHANNON,

Lorton Reformatory, Lorton, Virginia.

DEAR MR. SHANNON: The Government is mailing to you this United States flag, as a token of the appreciation and sympathy of a grateful nation, with the thought in mind that it will prove to be of sentimental value to you.

This flag was draped over the coffin of your late beloved brother, the late Pfc. James O. Watkins.

We were sorry to learn that you were unable to attend the services, but you may rest assured that every effort was made to extend every courtesy of respect and military honors.

Feel free to write to this office at any time if we can be of further assistance to you.

Sincerely yours,

(s/d) R. J. WILLIAMSON,

Colonel, U. S. Army, Officer in Charge.

Plaintiff is without personal knowledge of the exact date of the death of Insured, but is informed that it occurred January 3, 1946. A further communication received by Plaintiff dated 9 June 1950 read in part as follows:

Inasmuch as the death of your half-brother occurred while in active military service, * * *

Very truly yours,

(s/d) J. F. WHITTON, Jr.,

Major, FD, Finance Officer.

7. In spite of repeated demands and requests and in spite of a binding obligation to pay Plaintiff the face amount
21 of the said insurance policy in accordance with the appropriate Acts of Congress, Defendant has wrongfully refused and does now refuse to pay the said amount to Plaintiff in the manner aforesaid or in any other manner.

Wherefore, the premises considered Plaintiff prays that he be awarded Judgment in the amount of \$10,000.00, plus costs

and attorney fees, to be paid in the manner prescribed by the appropriate Acts of Congress.

Raymond Godbersen,
RAYMOND GODBERSEN,
*Attorney for Plaintiff, 420 Kass Building, 711 14th
Street NW., Washington, D. C., District 6494.*

This is to certify that I have mailed, postage prepaid, this 12th day of June 1951, a copy of the foregoing to Peter C. Charuhas, Esq., Room 3720, Department of Justice, Washington, D. C., Attorney for Defendant, and to John Sullivan, Esq., 939 D Street NW., Room 209, Washington, D. C.

Raymond Godbersen,
RAYMOND GODBERSEN,

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ANSWER

Comes now the defendant, United States of America, by its counsel, George Morris Fay, United States Attorney in and for the District of Columbia, Onan A. Hydrick, and Peter C. Charuhas, Attorneys, Department of Justice, and for answer to the plaintiffs' complaint says:

FIRST DEFENSE

The complaint fails to show that the action sought to be maintained against the United States is within the consent of the sovereign.

SECOND DEFENSE

1. The defendant denies the allegations contained in paragraphs 1, 3, and 5.

2. Defendant does not have sufficient information to form a belief as to the truth of the allegations contained in paragraph 2 and therefore denies the same.

3. Defendant denies the allegations contained in paragraph 4. Further answering the defendant says that James Odell Watkins (hereinafter referred to as the insured) was granted a \$10,000 policy of National Service Life Insurance, certificate No. N-8 575 456, effective February 1, 1943, for which he designated Mary Watkins, described as mother, as principal beneficiary and Prince A. Shannon, described as half brother, as

contingent beneficiary; that premiums on said policy were paid by allotment from the insured's service pay from the effective date of the policy to and including November 1945; that the said policy lapsed for nonpayment of the premium due December 1, 1945; but remained in force by virtue of the grace period of 31 days which expired at midnight, January 1, 1946, and that the principal beneficiary, Mary Watkins, died June 23, 1946.

23 4. Answering the allegations of paragraph 6, the defendant admits that the insured died on January 3, 1946, but says that the other allegations of this paragraph pertaining to the communications from officers of the Army constitute evidence and should therefor be stricken.

5. The defendant denies the allegations contained in paragraph 7 of the complaint. Further answering the defendant admits that claim for the insurance involved herein was made by the plaintiff upon the United States of America through the Veterans Administration, and that such claim was duly denied.

Except as heretofore specifically admitted or denied, defendant denies generally each and every allegation contained in the complaint.

WHEREFORE, the defendant, having fully answered, prays that the plaintiff take nothing by this action and that the same be dismissed, and that the defendant have judgment against the plaintiff for its costs and disbursements necessarily expended.

Dated this 10th day of August 1951.

George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney.

Onan A. Hydrick,
ONAN A. HYDRICK,
Attorney, Department of Justice.

Peter C. Charuhas,
PETER C. CHARUHAS,
Attorney, Department of Justice.

I certify that a copy of the foregoing answer was this 10th day of August 1951, mailed to Raymond Godbersen, 711 Fourteenth Street NW., Washington, D. C.

Peter C. Charuhas,
 PETER C. CHARUHAS,
Attorney, Department of Justice.

24 REPORT OF COMMISSIONER OF VETERANS' CASES

Plaintiff presents in his amended complaint basic and ultimate facts as allegations sufficiently clear to show a claim made by him in the Veterans' Administration; that this claim was denied, and that a disagreement between him and the Administration has been established. Section 19, World War Veterans Act, 1924, as amended, is the controlling statute which gives the plaintiff the consent of the Government to be sued in such instance.

The Government in its answer sets forth a defense that the Government has not consented to be sued in the instant case because plaintiff has not set forth in his complaint his reliance upon the provisions of such statute authorizing consent necessary. It is true that plaintiff has failed to set forth such statute and should be compelled to further amend by interlineation by adding the necessary words describing the statute. This can be done at the trial table.

The Government has reserved another defense that certain portions of paragraph No. 6 of complaint be stricken as being evidentiary only and matter to be offered as proof at hearing on the merits, subject to the rules of admissibility. Plaintiff has alleged a cause of action without the attacked portions in paragraph No. 6. The Government has been sufficiently advised of plaintiff's demand to enable it to file a complete answer without any disadvantage.

It is clear that the new Federal Rules of Civil Procedure, as amended, make it clear that no litigant will be ruled
 25 out of court for a mere failure of allegation if he can show, as here, that he has a substantial ground of dispute.

The only question is whether the said policy was in force and effect on the date of death of the insured through payment of premiums by allotment of soldier's pay, if any pay be due. While the Government records list the date of death of insured as of January 3, 1946, if the plaintiff can show that the insured died several days earlier than recorded, the Government will admit that the policy, through the grace period, was in effect at that time, but that remains to be determined.

In the early days of adjudicating War Risk Insurance claims, the Comptroller General held that where insured had authorized a deduction from his Navy pay for war risk premiums and there had been a failure to make deductions, if the failure was due entirely to the Government *and there is no affirmative evidence showing fault of the insured*, the insurance must be considered as continuing effective until attention was called to the error and opportunity given for correction. If the insured had died in meantime, the insurance may be paid subject to deduction of the unpaid premiums. *In re Anthony Alfred Skomski*, 3 Comp. Gen. 202.

CONCLUSION

I recommend that plaintiff amend his complaint at the trial table by interlineation to show the applicable statute giving him the statutory consent to sue the United States. I further recommend that the defense that certain portions of paragraph No. 6 of complaint be stricken be overruled as harmless allegations.

Respectfully submitted.

JOHN H. SULLIVAN,
Commissioner of Veterans' Cases.

cc: Attorneys for the Plaintiff and Defendant.

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ORDER DISMISSING CAUSE

In the United States District Court for the District of
Columbia

Civil No. 3481-50

PRINCE A. SHANNON, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed December 19, 1951. Harry M. Hull, Clerk.

ORDER DISMISSING CAUSE

This cause having come on for trial this 17th day of December 1951, the same having been heard.

It is ordered that this cause be, and the same hereby is dismissed.

Wherefore, it is adjudged that plaintiff take nothing by this action, that defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense.

HARRY M. HULL,

Clerk.

By DOROTHY M. BARRICK,

Deputy Clerk.

By direction of Judge Richmond B. Keech.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the court without a jury on December 17, 1951, and it appearing to the court that the only controversy is whether the \$10,000.00 policy of National Service Life Insurance issued to James O. Watkins was in force on January 3, 1946, and the court having duly considered the pleadings, the evidence and the argument of counsel and being fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. That James O. Watkins, hereafter referred to as the insured, following his entry into the military service, was issued effective February 1, 1943, a \$10,000.00 policy of National Service Life Insurance, No. N-8 575 456, for which he designated Mary Watkins, described as mother, as principal beneficiary, and Prince A. Shannon, described as half-brother, as contingent beneficiary; that the principal designated beneficiary died on June 23, 1946.

2. That on September 23, 1945, the insured was absent from his command without leave (AWOL), in which status he remained continuously until his death, which occurred on January 3, 1946, and that he was never restored to duty.

3. That premiums on the said policy were paid by allotment from the insured's service pay; that effective October 31, 1945, the allotment was discontinued because of the insured's

97 "AWOL" status and his pay and allowances were terminated and no payment was made of the premium which became due December 1, 1945; that the grace period under the policy afforded protection for thirty-one days thereafter and expired at midnight, January 1, 1946.

4. That the plaintiff, as contingent beneficiary under the said policy, filed claim for benefits under the said policy with the Veterans' Administration which claim was denied on June 12, 1947.

CONCLUSIONS OF LAW

1. That the court has jurisdiction of the subject matter of this litigation and the parties thereto.

2. That protection under the said policy of National Service Life Insurance having terminated on January 1, 1946, by reason of the discontinuance of the allotment because of the insured's "AWOL" status, the policy was not in force under premium-paying conditions or otherwise on January 3, 1946, the date of his death.

3. That the defendant, United States of America, is entitled to a judgment against the plaintiff and that the plaintiff take nothing by this action.

Let judgment be entered accordingly.

This 28th day of December 1951.

R. B. KEECH,
United States District Judge.

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JUDGMENT

The court having made findings of fact and conclusions of law in the above-entitled case in favor of the defendant and against the plaintiff, it is this 28th day of December 1951,

Ordered, adjudged and decreed, that the plaintiff, Prince A. Shannon, recovered nothing of and from the defendant, United States of America, under the National Service Life Insurance policy, which is involved in this litigation.

R. B. KEECH,
United States District Judge.

Approved as to form:

Charles M. Ireland,
CHARLES M. IRELAND,
United States Attorney,
D. Vance Swann,
D. VANCE SWANN,
Attorney, Department of Justice,
Peter C. Charuhas,
PETER C. CHARUHAS,
Attorney, Department of Justice,
Attorneys for defendant.
Raymond Godbersen,
RAYMOND GODBERSEN,
Attorney for plaintiff.

99 MOTION TO APPEAL PETITION IN FORMA PAUPERIS

Comes now the Petitioner, in Proper Person, and move that he be allowed to Prosecute Appeal in Forma Pauperis in the above-captioned case, to the United States District Court for the District of Columbia, and as grounds therefor, shows the Court as follows:

1. Section 1915, Title 28, United States Code (1948) Provides inter Alia:

Any Court of the United States may authorize the Commencement, Prosecution, or defense of any suit, action, or Proceeding, Civil or Criminal, or Appeal thereto, without Prepayment of Fees and Costs, or the giving of Security therefor. Such Affidavit shall state the Nature of the Action, Defense or Appeal, and Affiants Belief that he is entitled to Redress.

Denied—no substantial question. R. B. Keech, Judge, 2/1/52.

2. A supporting Affidavit in conformity with the foregoing Statutory requirements is attached hereto, and is by reference incorporated herein. Wherefor, the Premises considered, Petitioner Prays that he be allowed to Proceed on Appeal in Proper Person and in Forma Pauperis.

Prince Albert Shannon,
PRINCE ALBERT SHANNON,
Petitioner pro se.

Subscribed and sworn before me this 24th day of January 1952.

[SEAL]

WADE G. MADDOX,
Notary Public.

My commission expires December 17, 1954.

100 AFFIDAVIT IN SUPPORT OF MOTION TO APPEAL IN FORMA PAUPERIS

1. I, Prince Albert Shannon, being first duly sworn according to law, depose and say that I am the Petitioner in the above-captioned case, and in support of my application to proceed on Petition without prepayment of Fees and Costs, or the giving of security therefor, depose and say as follows:

2. That I am a citizen of the United States—that I believe I am entitled to the redress sought in this action, and that this Petition is made in good faith.

3. That because of my poverty I am unable to prepay the Fees and Costs of this Petition, or give security therefor.

4. Nature of Petition:

This is a Petition to Appeal above-captioned Case which was Dismissed in the District Court.

Prince Albert Shannon,
PRINCE ALBERT SHANNON,
Petitioner Pro se.

DISTRICT OF COLUMBIA, ss:

I, Prince Albert Shannon, being first duly sworn according to law, depose and say that I am the subscriber to the foregoing "Affidavit in support of Motion to Prosecute Petition in Forma Pauperis," and that all statements made therein by me are True to the best of my knowledge and belief.

Prince Albert Shannon,
PRINCE ALBERT SHANNON,
Petitioner Pro se.

Subscribed and sworn before me this 24th day of January 1952.

WADE G. MADDOX,
Notary Public.

104 NOTICE OF INTENTION TO APPLY FOR AN APPEAL:

Notice is hereby given this 22nd day of January 1952, that the Plaintiff hereby intends to Apply for an Appeal to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 7th day of January 1952, in favor of the United States of America against said suit for the Proceeds of the National Service Life Insurance Policy which my Half Brother was insured.

Prince Albert Shannon,
PRINCE ALBERT SHANNON,
Box 25, Lorton, Virginia.

Subscribed and sworn before me this 24th day of January 1952.

[SEAL]

WADE G. MADDOX,
Notary Public.

My commission expires December 17, 1954.

106 United States Court of Appeals for the District
of Columbia Circuit

No. 330, Miscellaneous

April Term, 1952

PRINCE ALBERT SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Before EDGERTON, CLARK and WASHINGTON, Circuit Judges,
in Chambers

Filed September 23, 1952. Harry M. Hull, Clerk.

United States Court of Appeals for the District of Columbia
Circuit. Filed September 19, 1952. Joseph W. Stewart,
Clerk. CA 3481-50.

ORDER

Upon consideration of petitioner's motion for leave to appeal
in forma pauperis from a judgment of the United States Dis-
trict Court for the District of Columbia, of respondent's ob-
jections thereto, and of the statement of counsel appointed
by this Court to represent petitioner in this matter it is

Ordered by the Court that the petition for leave to proceed
on appeal in forma pauperis from a judgment of the United
States District Court for the District of Columbia be, and it is
hereby, granted.

It is further ordered by the Court that the time for filing
the transcript of record herein be, and it is hereby, extended
to and including October 20, 1952.

Dated September 19, 1952.

Per Curiam.

By WILLIAM G. SECREST,
Deputy Clerk.

107 PLAINTIFF-APPELLANT'S DESIGNATION OF THE
RECORD

To the Clerk of the United States District Court for the District of Columbia:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Court of Appeals for the District of Columbia Circuit, with reference to the Notice of Intention to Apply for an Appeal filed by the Plaintiff in the above-entitled cause, prepared and transmitted as required by law and by rules of said court, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. Amended Complaint for Money Judgment for Proceeds of Life Insurance Policy, filed June 12, 1951.
2. Answer, filed August 10, 1951.
3. Report of Commissioner of Veterans' Cases, filed December 12, 1951.
4. Stenographic report of the hearing held on December 18, 1951.
5. Plaintiff's exhibits, numbered 1-4, inclusive.
6. Defendant's exhibits, numbered 1-3, inclusive.
7. Order Dismissing Cause, filed December 19, 1951.
8. Findings of Fact and Conclusions of Law, filed December 28, 1951.
9. Judgment, filed December 28, 1951.
10. Plaintiff's Motion to Appeal Petition in Forma Pauperis, filed January 26, 1952.
11. Plaintiff's Affidavit in Support of Motion to Appeal Petition in Forma Pauperis, filed January 26, 1952.
- 108 12. Notice of Intention to Apply for an Appeal, filed January 26, 1952.

13. Order of the United States Court of Appeals for the District of Columbia Circuit Granting Leave to Appeal in Forma Pauperis.

14. This Designation of the Record.

October 8, 1952.

C. Brewster Chapman, Jr.,
C. BREWSTER CHAPMAN, Jr.,
Attorney for the Plaintiff-Appellant,
Berge, Fox, Arent & Layne,
1002 Ring Building,
Washington, D. C.

Service of the foregoing Designation of Record acknowledged this 8th day of October 1952.

Charles M. Ireland,
CHARLES M. IRELAND,
United States Attorney for Defendant.

Peter C. Charuhas,
PETER C. CHARUHAS,
Assistant United States Attorney, Department of
Justice, Attorney for Defendant.